

SEP 12 1985

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September 10, 1985

Ms. Margaret Thompson
Office of Regional Counsel
United States Environmental Protection
Agency
Region II
26 Federal Plaza
Room 37
New York, New York 10278

Re: Duane Marine Salvage Site
Perth Amboy, New Jersey

Dear Ms. Thompson;

The purpose of this letter is to supplement Cosden Chemical Division's correspondence of July 8, 1985, which explained the company's position vis-a-vis the other respondents concerning compliance with the Administrative Order. At our meeting on August 27, 1985, you requested Cosden supplement its July 8, 1985, letter to provide you with a better understanding of Cosden's dealings with other respondents to the Administrative Order, its actions to further compliance with the Administrative Order, and its reasonable efforts to resolve differences among the respondents with respect to appropriate allocation of costs at the site.

Cosden's first notice from EPA concerning the Duane Marine Site was in a November 26, 1984, letter requesting information on what substances, if any, may have been sent to that site by Cosden. Cosden timely responded to that request in a December 10, 1984, letter from Gary C. Reed, plant manager of the Cosden facility in

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East Windsor, New Jersey.¹

Cosden's next notice from EPA about the site was a December 3, 1984, letter which enclosed a copy of an Administrative Order that required Cosden and other parties to undertake certain actions at the Duane Marine Site. That letter also announced a December 13, 1984, meeting to discuss the Administrative Order. Gary Reed attended that meeting on behalf of Cosden and participated in the morning session as well as an afternoon session involving only the respondents. As a result of the afternoon meeting, Bob Anderson, who was then the company's assistant general counsel with responsibility for environmental matters, joined the steering committee² while Ted Nairn of Cosden agreed to serve on the technical committee.

Mike Godfrey, an attorney with Cosden's parent corporation, participated in the first steering committee meeting held on January 28, 1985, at which time the question of allocating costs for the Phase I work was discussed. Based upon Cosden's presentation, the steering committee decided, without prejudice to later allocation decisions, to delete Cosden's stormwater contribution in determining the volume of waste Cosden allegedly sent to the site. The committee then decided to allocate the Phase I costs on the basis of the volume of waste each respondent supposedly contributed to the site after appropriate reductions for Cosden. Under this approach, Cosden was responsible for approximately

¹In that reply, Cosden noted that its records differed from the New Jersey manifests concerning the amount of material purportedly shipped to the site by Cosden. At the August 27, 1985, meeting, it was apparent this point needed further clarification. Cosden is in the process of putting together exhibits which describe which manifests differ from invoices received for the material described in the manifests. We will also be supplying an analysis of a representative sample of stormwater from the East Windsor facility that provides evidence of the extremely low concentrations of materials of concern found in the stormwater.

²Shortly after joining the steering committee, Mr. Anderson developed severe heart problems which have now forced him to withdraw from active association with the company. In Mr. Anderson's absence, two other company attorneys, first Mike Godfrey and then Leon Oliver, represented the company's interest.

13 percent of the cost of Phase I work, and on February 7, 1985, sent a check to Jack Lynch, secretary of the steering committee, for \$5,322.99 representing the company's volumetric share of costs.³ Cosden had previously on December 31, 1984, sent \$2,000 to Jack Lynch representing an initial assessment against all respondents to the Administrative Order designed to cover the costs of certain immediate security measures instituted at the site as well as miscellaneous administrative costs.

Cosden was unable to participate in the next meeting of the steering committee held on April 3, 1985, because of short notice (announcement of the meeting not occurring until March 28, or 29, 1985, by mailgram), and the location of the meeting in New York City. Nevertheless, Mike Godfrey did contact Norman Bernstein, chairman of the steering committee, after the meeting and was advised that nothing of substance had occurred because information on alleged waste contributions from new respondents was still not available from EPA.

The next meeting of any group of respondents was an allocation committee meeting on June 7, 1985, announced May 27, 1985. Prior to this meeting, Cosden knew that the issue of a discount for stormwater would be the subject of further discussion. However, Cosden had received no indication that the steering committee would not agree to continue to discount the volume of stormwater supposedly sent by the company to the site in determining Cosden's volumetric share of the Phase II work. Nevertheless, at that meeting the other represented respondents sought to require Cosden to contribute monies based on a volume that included all stormwater. Cosden indicated that approach was unacceptable. Until July 8, 1985, Cosden continued to try and resolve the controversy by suggesting a series of compromise allocations based upon different volumetric or other approaches, all of which were rejected by the allocation committee.

The allocation committee did offer to reduce Cosden's stormwater volume as part of a compromise and settlement proposal. By July 8, 1985, Cosden was offering to pay solely on a compromise

³All payments made by Cosden, as well as any offers to pay money regarding work at the site were strictly part of compromise and settlement proceedings and were not intended to indicate Cosden believes it is a responsible party at the site or that the company believes the amounts of money involved are appropriate.

and settlement basis, approximately \$200,000 and the other respondents were demanding approximately \$260,000. At that point, no agreement could be reached, although Norman Bernstein did suggest he might recommend the group accept a figure of approximately \$230,000. No such counter offer was received by Cosden. Cosden was unwilling to accept that figure, since it believes its compromise and settlement offer of approximately \$200,000, which would represent a payment of more money than any other respondent in the order, is more than fair in that it represents less of a discount for stormwater than has been allowed at other sites around the country, and is in excess of what it believes a court would determine was the company's liability in comparison to other respondents at the site.⁴

Besides its involvement in attempting to resolve allocation questions between June 7 and July 8, 1985, Cosden was also actively involved with the technical committee through its representative, Ted Nairn. Mr. Nairn participated in a review of the bids for the Phase II work. He agreed with the scope of work developed as well as the contractor selected.

Simply stated, Cosden is not a "freeloader" at this site. Cosden's representatives actively participated on all committees. Cosden contributed the second highest amount of money for Phase I work, and offered to pay more money than any other respondent for all work at the site. The company is also in complete agreement with who should perform and what should be performed as Phase II work. Finally, Cosden has already contributed more money toward all remedial activity than over half of the respondents in this case.

The Administrative Order issued to Cosden specifies joint and several liability. Therefore, by its terms, if any one party is complying with the order to the satisfaction of EPA, there can be no violation of the order on which to base an enforcement action. Under traditional notions of joint and several liability, if a judgment creditor is paid in full by one of several defendants, it does not continue to have a cause of action against the other defendants. Region II, however, apparently attempts to avoid this rule of joint and several liability by continuing to maintain it

⁴In this regard, it should be noted there is a high degree of probability that if Cosden's stormwater arrived at the Duane Marine Site, it went into the Perth Amboy sewer system shortly after receipt, and is not contributing to any problem that may currently exist at the site.

has an enforcement claim against a respondent if that party's monetary contribution toward the cost of ordered activities is believed by EPA to be insufficient. Cosden believes it is incorrect as a matter of law, and inappropriate as a matter of policy, for EPA to look to contributions to the steering committee as the determinate of performance under the Administrative Order.

The respondent or respondents who believe they are paying more than their proper share of costs to discharge their joint obligations may have a cause of action against other respondents. Any such dispute is a complex and private matter involving each party's perception of its liability to other parties under existing concepts of joint and several liability under Superfund. A number of recent decisions, while recognizing liability under Superfund may be joint and several, have also found a right of contribution, State of Colorado v. Asarco, No. 83-C-2388 (D. Colo. May 13, 1985); United States v. Ward, 22 E.R.C. 1235 (E.D. N. Car. 1984); see also United States v. A. & F. Materials Co., 578 F. Supp. 1249, 1261 (S.D. Ill. 1984). The contribution mechanism recognized by these courts, however, allows apportionment of costs on some basis other than per capita, the traditional apportionment of damages under joint and several liability, or strictly volumetric. Cosden believes it has made good faith efforts to cooperate with the other respondents and that under any reasonable rule of contribution described above, its share of the costs at this site (assuming it is a responsible party) are significantly less than the monies it has already offered to pay for work required by the Administrative Order.

In general, the other respondents are large companies actively involved at other Superfund sites with the necessary financial, technical and legal resources to seek judicial relief if they believe Cosden's offer (which offer has been rejected by the steering committee) is inconsistent with the current state of the law. Nevertheless, it appears that based on complaints raised by other respondents, EPA has seen fit to threaten enforcement action against Cosden in an attempt to force the company to accept the steering committee's demands. In essence, EPA is being asked by other respondents to become involved in the allocation process by threatening to sue Cosden if it does not accept an allocation imposed by those parties. If EPA were to bring such an enforcement action, it would be in effect ratifying that allocation, and thereby choosing sides in an allocation dispute, an action which Region II has wisely avoided in the past because of the complexity and private nature inherent in the allocation process, and the possibility of the agency being involved in more litigation.

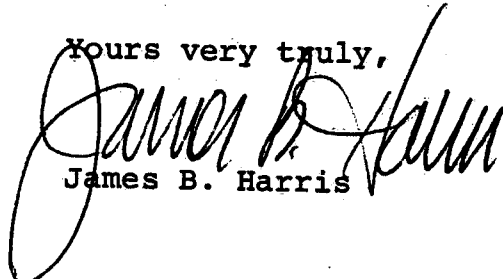
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This case does not involve a company which has refused to become involved in achieving compliance with an Administrative Order. Rather, this case involves a company which has worked diligently with other respondents and has contributed the time of its personnel and its money. Where, as here, the Administrative Order at issue is being complied with, and the parties have a truly private dispute that can, if necessary, be resolved through the courts without delaying the cleanup or otherwise involving EPA, no policy reason exists for EPA to attempt to impose a particular allocation on the respondents.

Cosden is prepared to renew its compromise and settlement offer of approximately \$200,000 to the steering committee. If EPA wishes to consider whether the agency can assist the parties in settling their dispute without the type of active involvement that indicates acceptance and advocacy of one position over another, Cosden will be pleased to work with the EPA. Cosden continues to believe, however, that if EPA chooses not to become involved, the dispute between respondents would be resolved in the near future without effecting cleanup efforts.

I trust that this letter has provided you with the additional information needed to fully appreciate the current dispute between the respondents to the administrative order. If you should have any questions or desire any additional information, please do not hesitate to contact me.

Yours very truly,


James B. Harris

JBH/JB

copy: Mr. Leon Oliver
Mr. Michael Rodberg